83-514

No.

Office Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ELIZABETH JANE HALL - - - Petitioner

vs.

UNITED STATES OF AMERICA, ET AL. - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EDWIN F. KAGIN
6809 LaGrange Road
P. O. Box 77
Pewee Valley, Kentucky 40056
(502) 241-5554
Counsel for the Petitioner

Of Counsel:
DONALD F. ARMSTRONG, JR.
Suite 114, The 310 Bldg.
Louisville, KY 40202

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.

ELIZABETH JANE HALL, - - - *Petitioner*

v.

UNITED STATES OF AMERICA, Et Al. - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States: Elizabeth Jane Hall, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on March 25, 1983.

OPINIONS BELOW

The opinions and orders of the district court (Appendix A, *infra,* pp. 1a-16a) are not reported. The opinion of the Court of Appeals (Appendix B, *infra,* pp. 17a-27a) is reported at 704 F. 2d 246 (6th Cir., 1983).

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1983 (Appendix C, *infra,* p. 28a). By order dated July 25, 1983, Mr. Chief Justice Burger extended the time for filing a petition for a writ of certiorari to and including September 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Are the Respondent officials entitled to absolute immunity from actions for damages?
2. Are the Respondent officials entitled to only a qualified immunity good faith defense?
3. Are the Respondent officials required to plead any qualified immunity defense they may have available?
4. Did the District Court abuse its discretion in granting summary judgment after not allowing the Petitioner an opportunity to discover evidence to oppose the Motion?
5. Did the District Court err when it granted summary judgment resting on pleadings alone?
6. Did the Court of Appeals err when they found the Defendant entitled to qualified immunity?
7. Did the Court of Appeals err when they failed to remand the case back to the District Court with directions as to the qualified immunity defense?
8. Did the District Court fail to comply with the Supreme Courts directives as to damages?

STATUTES INVOLVED

42 U.S.C. §§ 1981, 1982, 1983, 1985, Constitution of the United States, Amendments IV, V, IX, and XIV (Appendix D, *infra*, pp. 29a-34a).

STATEMENT

This case is a sequel to *Laing* v. *United States sub nom Hall* v. *United States*, 423 U. S. 161 (1976), in which the issuance of an injunction against the Internal Revenue Service, by the District Court against the sale of Plaintiff's automobile and other personal property wrongfully levied upon was upheld. Ten years, and ten Court terms later, Mrs. Hall is still without relief. The issue now presented to this Honorable Court is whether or not Mrs. Hall may sue the offending Internal Revenue Service Agents for damages, whom this Court has previously held had violated her constitutional and statutory rights. The District Court and the Court of Appeals for the Sixth Circuit both have held that Mrs. Hall may not have her day in court for a jury of her peers to decide whether she should be made whole for the damages done ten years before.

In *Hall* v. *United States*, 423 U. S. 161, at 210, footnote 14, in dissent, Mr. Justice Blackmun stated, "I do not condone abuse in tax collection. The records of these two cases do not convincingly demonstrate abuse, although Mrs. Hall's situation, as it developed after the initial critical moves by the Service, makes one wonder. I have no such concern whatsoever about Mr. Laing.

In any event, abuse is subject to rectification otherwise, and the Congress and the courts surely will not be unsympathetic. Cf. *Bivins* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971)".

Ten years after Mr. Justice Blackmun opined that the courts should be open to Mrs. Hall, she has been unable to take her case before a jury. Petitioner, after succeeding on her merits for injunctive relief before this Honorable Court, subsequently attempted to proceed back in the District Court for damages pursuant to the provisions as set out in *Bivins, supra,* and 42 U.S.C. §§ 1983, 1985, and the Constitution of the United States.

The District Court denied such and hastily granted all Defendants summary judgment and granted them absolute immunity.

Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit, and the decision of the District Court was overturned by the Sixth Circuit which found that Respondents were only entitled to a qualified immunity, but in light of the record the Court of Appeals found that Respondents had met that burden. Petitioner still disagreed and believed, with Mr. Justice Blackmun, that the courts should "not be unsympathetic".

The Petitioner then appealed to this Court.

REASONS FOR GRANTING WRIT

This case presents issues that this Honorable Court must address, in that there is an explicit conflict between the Circuits, making it impossible to determine the National *stare decisis* when similar questions arise.

The lower courts erroneously ruled that there was not a cause of action stated by Mrs. Hall, failing to fully recognize the Constitutional causes of action established by this Court in *Bivins, supra* and in *Davis* v. *Passman,* 422 U. S. 288 (1979). The lower courts also failed to appreciate that the officials alleged immunity does not under any theory protect them when they are acting beyond their authority or in violation of the Constitution. *Dugan* v. *Rank,* 372 U. S. 609, 622 (1963); *Philadelphia Co.* v. *Stimsen,* 223 U. S. 605, 619-620 (1912); *Stark* v. *Wickard,* 321 U. S. 288, 290 (1944); *Ex parte Young,* 209 U. S. 123 (1908). The dismissed defendants were dismissed by advancing an argument plainly foreclosed by decisions of this Court.

Further, there has been a substantial deviation from rulings of this Court on the qualified immunity, good faith defense, thereby necessitating the intervention of this Honorable Court.

Immunity is a defense to the action which must be pleaded and proved and it is insufficient to say, as the dismissed Defendants did, that the acts complained of were within the limits of their authority or in furtherance of "matters committed by law to [their] control or supervision". *Spalding* v. *Vilas,* 161 U. S. 483, 498 (1896). Their self-serving affidavits and statements

are legally insufficient. *Howard* v. *Lyons,* 360 U. S. 593, 597-598 (1959).

The lower courts ignored the obvious bad faith of Defendant Acting Director McHugh, who failed to issue Mrs. Hall a deficiency notice, when I.R.S. regulations required same to be sent, and when four months previously, the same I.R.S. service had been enjoined from identical behavior in *Rambo* v. *United States, et al.,* 353 F. Supp. 1021 (W. D. Ky. 1972).

Further, there currently exists an insurmountable conflict among the Circuits that can only be resolved with finality by this Court's granting, once again, a Writ of Certiorari to Elizabeth Jane Hall. *Rutherford* v. *United States,* 702 F. 2d 580 (5th Cir., 1983), holds directly contrary to the holding of the Sixth Circuit in *Hall, supra.*

We have recently learned that after the decision in *Rutherford,* the Federal Agents settled the case with Mr. Rutherford, rather than risk going to trial by jury. In short, the Government was so wrong, as they are in Mrs. Hall's case, that they had relied on the courts to protect and condone their unlawful acts. There cannot be one standard for Mr. Rutherford and another standard for Mrs. Hall.

The Writ should be granted so that District Judges throughout the United States and it's territories may know with certainty the standards to be applied when similar issues are presented to them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWIN F. KAGIN
6809 LaGrange Road
P. O. Box 77
Pewee Valley, Kentucky 40056
(502) 241-5554
Counsel for the Petitioner

Of Counsel:
DONALD F. ARMSTRONG, JR.
Suite 114, The 310 Bldg.
Louisville, KY 40202

September 1983

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 7571-L(G)

ELIZABETH JANE HALL, - - - - - - *Plaintiff,*

v.

UNITED STATES OF AMERICA, et al., - - *Defendants.*

MEMORANDUM OPINION AND ORDER—
Entered August 5, 1976

On February 1, 1973, the Internal Revenue Service terminated the 1973 taxable year of the plaintiff and made a tax assessment against her in the amount of $52,680.25. Thomas P. McHugh was acting district director on February 1, 1973 and he approved the jeopardy termination.[1] McHugh's regular employment was, and remains, chief of the audit division within the district director's office in Louisville, Kentucky.

When the plaintiff was unable to make immediate payment of the assessment her 1970 Volkswagen automobile was seized. On March 9, 1973, we entered a preliminary injunction in the case restraining the defendants from seizing any of the plaintiff's property. This decision was af-

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[1]This action was taken because the I.R.S. believed the plaintiff was involved in illicit drug activities, which would prejudice or render ineffectual collection of income taxes for the 1973 calendar year.

firmed by the Sixth Circuit Court of Appeals, 493 F. 2d 1211 (1974), and by the United States Supreme Court, *sub nom Laing* v. *United States*, ____ U. S. ____, 96 S. Ct. 473 (1976).

In plaintiff's complaint she not only sought the aforestated injunctive relief but also $20,000.00 in actual damages and $1,000,000.00 in punitive damages against the defendants. Having fully litigated the injunction issue, the case now comes before us on the question of the alleged personal liability of the defendant McHugh.

Both the plaintiff's and McHugh's deposition have been taken. The plaintiff has testified that she does not know McHugh nor has she ever spoken to him. Importantly, McHugh's deposition demonstrates the only role he played was in approving, upon recommendation, the termination of plaintiff's taxable year and in levying the tax assessment. McHugh was not in direct contact with the revenue agent who prepared the assessment nor was he in direct contact with the officer who seized the plaintiff's automobile.

An affidavit signed by Paul Niederecker, district director for the Louisville District, states that he appointed McHugh as acting district director for January 31, 1973, and February 1, 1973. One of the duties of the district director, or in this case the acting district director, is to approve jeopardy termination pursuant to 26 U.S.C. 6851. Niederecker also stated in his affidavit: "I have reviewed termination approval and find that the proper procedures were followed in the case of Jane W. or Elizabeth Jane Hall. . . ."

This case is now before us on McHugh's motion for summary judgment. He supports this motion on three grounds: (1) the Court lacks subject matter jurisdiction to entertain any claim for damages against him; (2) he is protected by official immunity from the plaintiff's damage claim; and (3) the complaint fails to state a claim upon which relief

can be granted. We need only consider the first two arguments raised by McHugh.

Plaintiff alleges in her complaint and amended and supplemental complaint that the defendants' actions violate 42 U.S.C. 1983, 1985 and 1986 and that jurisdiction therefore rests in this Court under 28 U.S.C. 1343.

Before a defendant can be liable for damages under 42 U.S.C. 1983 it must be shown that the defendant has deprived the plaintiff of one or more of his civil rights *under color of state law.* In this case, however, McHugh was acting under color of federal law; therefore, he is not susceptible to suit under 42 U.S.C. 1983. *Bethea* v. *Reid,* 445 F. 2d 1163 (3rd Cir. 1971).

In addition the plaintiff cannot demonstrate the conspiratorial actions on the part of McHugh which are necessary to bring this case under 42 U.S.C. 1985; nor can she demonstrate that McHugh had knowledge that there were certain wrongs conspired to be done or about to be committed against her and that he had the power to prevent these wrongs and neglected or refused to do so, hence, she cannot come under 42 U.S.C. 1986. Finally, she cannot come under the doctrine set forth in *Kletschka* v. *Driver,* 411 F. 2d 436 (2d. Cir. 1969). *Kletschka* stands for the proposition that where a joint conspiracy between federal and state officials results in the deprivation of a person's civil rights then the federal officials are liable in damages under 42 U.S.C. 1983 if the state officials played a significant role in the joint conspiracy.

The plaintiff's downfall under 42 U.S.C. 1985 and the *Kletschka* rule is that she has not shown one piece of evidence to connect McHugh with any conspiracy to deprive her of her civil rights. Similarly, she has failed completely to demonstrate that McHugh knew that others were conspiring to deprive her of her constitutional rights, a fact she must establish before liability results under Section 1985. Because she cannot demonstrate a violation by Mc-

Hugh of either 42 U.S.C. 1983, 1985 or 1986, the Court cannot take jurisdiction of this case under any subsection in 28 U.S.C. 1343.

The plaintiff's response to the total void of proof in this case is that she has made the requisite conspiracy allegations in her complaint "and now must be left to her proof." *Plaintiff's Brief* at 4. Plaintiff forgets, however, that both her deposition and McHugh's deposition have been taken and it is clear from the testimony therein that McHugh was not personally involved in any conspiracy with state or other federal officials; and, that if a conspiracy did exist he had no knowledge of it. In short, McHugh has come forward with these depositions and supported his motion for summary judgment, therefore, the plaintiff cannot merely point to her pleadings and demand the Court overrule the motion for summary judgment. In *Bryant* v. *Commonwealth*, 490 F. 2d 1273, 1275 (6th Cir. 1974) the Court in a per curiam opinion stated:

> (W)here the movant brings forward and supports his motion for summary judgment, his opponent may not rest merely upon his pleadings but rather must come forward to show genuine issues of fact. Mere conclusory and unsupported allegations, rooted in speculation, do not meet that burden.

We believe this case falls squarely upon the above-stated principle; thus, the Court lacks subject matter jurisdiction in this case under 28 U.S.C. 1343(1)(2) or (3). Parenthetically, we note that 28 U.S.C. 1343(4) is inapplicable given the allegations in the plaintiff's complaint.

Plaintiff also alleges that the Court has subject matter jurisdiction in this case under the constitutional tort doctrine announced in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U. S. 388 (1971). The defendant disputes this jurisdictional argument by

contending, yet without citing authority, that *Bivens* is limited to Fourth Amendment cases.

There is a substantial dispute between the lower federal courts as to the proper scope of the *Bivens* doctrine. Some courts have held *Bivens* extends beyond Fourth Amendment cases. *Eg. Dry Creek Lodge, Inc.* v. *United States,* 515 F. 2d 926, 931-32 (10th Cir. 1975); *United States ex rel. Moore* v. *Koelzer,* 457 F. 2d 892, 894 (3rd Cir. 1972); *Howard* v. *Warden, Petersburg Reformatory,* 348 F. Supp. 1204 (E.D. Va. 1972). Other courts have held that *Bivens* is limited to Fourth Amendment cases. *Eg. Moro* v. *Telemundo Incorporado,* 387 F. Supp. 920, 924 n. 1 (D.P.R. 1974), *Moore* v. *Schlesinger,* 384 F. Supp. 163, 165 (D. Colo. 1974); *Davidson* v. *Kane,* 337 F. Supp. 922 (E.D. Va. 1972). *See also Jones* v. *United States,* 401 F. Supp. 168, 174-75 (E.D. Ark. 1975).[2]

We will assume, although we do not decide, that *Bivens* does extend beyond the Fourth Amendment and encompasses this case. The Court need not decide this jurisdictional issue because we have concluded that even if we do have subject matter jurisdiction McMugh's motion for summary judgment must be sustained. Our basis for this conclusion is that McHugh was protected by official immunity when he acted on February 1, 1973.

When analyzing whether a federal official's acts are protected under the doctrine of official immunity, *Barr* v. *Matteo,* 360 U. S. 564 (1959), is the lodestar. *Barr* v. *Matteo* set forth two prongs which must be analyzed to determine whether official immunity applies. Those two test are: scope of authority and discretionary functions. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau*

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[2]For an extensive list of those cases which have either held that *Bivens* is limited to Fourth Amendment cases or extends beyond the Fourth Amendment, see *Panzarella* v. *Boyle,* 406 F. Supp. 787, 792 ns. 6 and 7 (D. R.I. 1975).

of Narcotics, 456 F. 2d 1339, 1343-47 (2d Cir. 1972) (on remand from 403 U. S. 388).

Under the "scope of authority" prong the Court must determine what the Supreme Court in *Barr* v. *Matteo* meant when it stated that the act or acts which form the basis for the lawsuit must be "within the outer perimeter of [the official's] line of duty." 360 U. S. at 575. The Second Circuit Court of Appeals in *Bivens* defined this phrase as follows:

> We believe that what is meant by the phrase "within the outer perimeter of [an official's] line of duty" is that the officer must have been acting in his role as a government officer.

456 F. 2d at 1345.

McHugh's duties as acting district director included approving termination assessments against certain taxpayers. The evidence in this case demonstrates that McHugh did approve the termination of the plaintiff's taxable year and did approve levying a tax assessment against her in the amount of $52,680.25. Mr. Niederecker has stated in his affidavit that the proper procedures were used by McHugh when he approved the termination assessment. In short, McHugh was doing precisely what the duties of his employment as acting district director required. Hence, we hold that when McHugh approved the termination assessment against Mrs. Hall he was acting "within the outer perimeter of [his] line of duty."

After the official makes the aforestated "scope of authority" showing he then proceeds to the second stage of the analysis, the "discretionary functions" stage. Under this prong he must demonstrate that the performed "discretionary acts at those levels of government where the concept of duty encompases the sound exercise of discretionary authority." *Barr* v. *Matteo, supra* at 575; *Bivens, supra* at 1345.

Courts have consistently held that the district director's use of jeopardy assessments is within the broad discretion of his office. *Homan Mfg. Co.* v. *Long*, 242 F. 2d 645 (7th Cir. 1957); *Commonwealth Development Assoc. of Pennsylvania* v. *United States*, 365 F. Supp. 792, 796 (M.D. Pa. 1973) *aff'd* 503 F. 2d 1398 (3d Cir. 1974); *Parenti* v. *Whinston*, 347 F. Supp. 471, 472 (E.D. Pa. 1972). Although the cited authorities deal with 26 U.S.C. 6861, the jeopardy assessment statute, we do not understand why those cases do not also apply to the district director's power to enter a termination assessment under 26 U.S.C. 6851. *Cf. Laing* v. *United States*, 96 S. Ct. at 482 (Court noted the jeopardy assessment and jeopardy termination provisions have long been treated in closely parallel fashion). In sum we believe the district director's use of the jeopardy termination provision of 26 U.S.C. 6851(a)(1) is within the broad discretion of his office.

Not only can the approval of a jeopardy termination be termed a discretionary function of a district director's office and thus bring that act within the ambit of official immunity, but we also believe as a matter of policy the approval of a jeopardy termination falls within the "discretionary functions" test.

In *Gustavsson Contracting Co.* v. *Floete*, 299 F. 2d 655 (2d Cir. 1962) *cert. denied* 374 U. S. 827 (1963) the Second Circuit Court of Appeals stated the real question which must be answered is not whether an act is "discretionary" but whether "the act complained of [is] the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?"

The jeopardy termination provision has a salutary purpose. It provides a method by which the government can secure taxes from those who are unlikely to pay the taxes owed by them. To insure the proper use of the jeopardy termination provision the district director must

not be under the constant pressure of a potential lawsuit if it is ultimately determined that the termination should not have been issued.

In conclusion, even if we assume, *arguendo,* that we have subject matter jurisdiction pursuant to *Bivens* to entertain a damage suit against McHugh, we must hold that the evidence before us demonstrates only that McHugh, as a regular duty of the district director's office, issued a jeopardy termination against the plaintiff. Such an action on his part is protected under the doctrine of official immunity. Again we emphasize the conclusory allegations of conspiracy set forth in the plaintiff's complaint are merely rooted in speculation at least insofar as McHugh is concerned, and, thus they cannot deprive McHugh of his summary judgment. *Bryant* v. *Commonwealth, supra.*

WHEREFORE, FOR THE FOREGOING REASONS, it is hereby ORDERED that defendant McHugh's motion for summary judgment shall be, and the same is hereby, SUSTAINED.
Dated:

(s) James F. Gordon
Senior United States District Judge

Copies to:
Counsel of record

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 7571-L(G)

ELIZABETH JANE HALL, - - - - - - *Plaintiff,*

v.

UNITED STATES OF AMERICA, et al., - - *Defendants.*

MEMORANDUM OPINION AND ORDER—
Entered March 17, 1977

The defendant Elmer Snider has moved the Court for summary judgment. Previously, the Court ordered summary judgment in favor of the defendant Thomas McHugh. Mr. Snider was a "group manager" of the Internal Revenue Service, his position being several steps below that of Mr. McHugh. (McHugh's deposition, pages 11-13).

The plaintiff alleges that Snider wrongfully initiated a termination assessment against her. He allegedly did this in conspiracy with various Kentucky state officials.

The evidence shows that one Gerald Huber was responsible for the preparation of the tax termination assessment. He was the field agent whose report was the basis of the actions of, initially, Mr. Snider and, eventually, Mr. McHugh. Snider was one of many persons who "signed off" on the paperwork as it crept toward final approval by Mr. McHugh. (McHugh's deposition, page 11). Indeed McHugh stated that he approved the assessment based upon Huber's report, not Snider's or any other person's recommendation. (McHugh's deposition, page 27).

Mr. Snider admitted by affidavit that he did approve the termination assessment against plaintiff. He stated,

and plaintiff agreed with this, that he did not know plaintiff, had never seen plaintiff, and had never talked with her.

It appears that the sole reason for the appearance of Mr. Snider in this lawsuit relates to an appearance by Snider to plaintiff's lawyers shortly after the assessment was levied. The plaintiff's attorneys wanted to see Mr. McHugh, but he was not available. (McHugh had actually signed the assessment letter). Thus, Mr. Snider, one of many who signed off on the assessment recommendation, appeared in McHugh's place. By all accounts, he refused to "unauthorize" the assessment, for whatever reason. (Plaintiff's deposition of March 1, 1976, pages 28-29).

In arguing against defendant Snider's motion, the plaintiff asserts no facts in support of her allegations of "conspiracy" with state officials. She merely points to the pleadings in defense of the motion. As the Court pointed out in its earlier memorandum opinion, the plaintiff must do more in defense of a motion for summary judgment than point to the pleadings. *Bryant* v. *Commonwealth,* 490 F. 2d 1273 (6th Cir. 1974).

Mr. Snider's actions against plaintiff have not been shown in any way to be other than routine approval of a field audit. The allegation of conspiracy, etc., has remained only an allegation, with no proof offered that Snider personally deprived or conspired to deprive plaintiff of any federal right. The essence of liability under the civil rights laws is personal liability. The doctrine of "respondeat superior" does not apply. *Jennings* v. *Davis,* 476 F. 2d 1271 (8th Cir. 1973); *Adams* v. *Pate,* 445 F. 2d 105 (7th Cir. 1971); and *Rizzo* v. *Goode,* 423 U. S. 362 (1976). In *Rizzo,* the desenters recognized that the majority was ruling out any doctrine of vicarious responsibility under the civil rights act. (423 U.S. at p. 384-85).

Of course, the plaintiff has failed to show that Snider was in any way acting pursuant to state law, custom or usage in his actions. Thus, under 42 U.S.C.A. 1983, plain-

tiff has still failed to assert a cause of action. It is undisputed that Snider was operating pursuant to his authority as an Internal Revenue Service agent.

Plaintiff cannot remedy this "state action" defect by asserting a conspiracy with state officials pursuant to either 42 U.S.C.A. 1985 or 1986. Section 1985 deals with interference with the right to vote, to serve on juries, or to have equal protection under the laws. Section 1986 deals with vicarious liability of others who have knowledge of Section 1985 violations.

In this case, plaintiff has not alleged any conspiracy to keep her from voting or otherwise enjoying the equal protection of the law. Her whole complaint deals with alleged violations of her right to due process of law. As such, she has not alleged any violation under either Section 1985 or 1986 of the civil rights laws. See *Tollett* v. *Laman*, 497 F. 2d 1231 (5th Cir. 1974); *Collins* v. *Bensinger*, 374 F. Supp. 273 (D.C. Ill., 1974), aff'd 506 F. 2d 1405. And, again, plaintiff has done nothing more than point to the pleadings for proof of any conspiracy.

Plaintiff also attempts to assert a claim based directly on the Fourth Amendment. It is too late to amend the complaint for additional jurisdictional allegations and, in any event, she has not shown any personal violation by Snider. *Rizzo* v. *Goode, supra.* The Court does not reach the question of immunity as that issue need not be decided in view of the failure of the complaint to state a claim.

It Is Therefore Ordered that defendant Snider's motion for summary judgment be Sustained and that the complaint against him be dismissed.

March 15, 1977

(s) James F. Gordon
Senior United States District Judge

Copies to:
Counsel of record

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 7571-L(G)

ELIZABETH JANE HALL, - - - - - - *Plaintiff,*

v.

UNITED STATES OF AMERICA, et al., - - *Defendants.*

MEMORANDUM OPINION AND ORDER—
Entered May 2, 1977

The United States has moved to dismiss plaintiff's claim for damages on grounds that the United States has not waived sovereign immunity. Plaintiff contends that the Administrative Procedure Act subjects the United States to review in the District Court.

The Court has been presented and has found no authority for the proposition that the Administrative Procedure Act enables a plaintiff to sue the United States in tort. Rather, as the United States points out, such suits are authorized only when the United States has consented to suit or the Congress has otherwise statutorily waived immunity. The only basis for this suit, then, is the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*

Even if the acts complained of herein constituted a tort, the Act exempts from coverage . . .

> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer.

Accordingly, the plaintiff may not maintain this damage suit against the United States. *Krouse* v. *United States Government Treasury Department Internal Revenue Service,* 380 F. Supp. 219 (C.D. Cal. 1974); *Morris* v. *United States,* 521 F. 2d 872 (9th Cir. 1975).

It Is Ordered that defendant United States' motion for judgment on the pleadings is Sustained.

April 29, 1977

(s) James F. Gordon
Senior United States District Judge

Copies to:
Counsel of record

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 7571-L(G)

ELIZABETH JANE HALL, - - - - - - *Plaintiff,*

v.

UNITED STATES OF AMERICA, et al., - - *Defendants.*

PARTIAL JUDGMENT—Entered May 2, 1977

For all the reasons stated in the Memorandum Opinion of this day,

IT IS HEREBY ORDERED AND ADJUDGED that the United States of America be, and it is hereby, dismissed as a party to these proceedings.

April 29, 1977

(s) James F. Gordon
Senior United States District Judge

Copies to:
Counsel of record

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action 7571-G

ELIZABETH JANE HALL, - - - - - *Plaintiff,*

v.

UNITED STATES OF AMERICA, et al., - - *Defendants.*

ORDER AND JUDGMENT—Entered July 2, 1981

Counsel having tendered this order for the Court's consideration, and the Court having considered same and being fully advised, finds and orders as follows:

1. That the defendant, Donald Powers, is the sole remaining defendant in this action; all other defendants having been previously dismissed by order of this Court.

2. That the defendant, Donald Powers could not have conspired with himself, and therefore those counts in the complaint alleging a conspiracy must fail.

3. That the pleadings and proof, as developed through discovery, show that the plaintiff should not prevail on her claim against the defendant, Donald Powers.

4. The defendant, Donald Powers, is entitled to judgment on the merits in this action, over the objection of the Plaintiff.

THEREFORE, it is ordered and adjudged that the complaint of the plaintiff against the defendant, Donald Powers, is hereby dismissed, with prejudice, at the costs of the

plaintiff. This is a final and appealable Order.
Dated: July 1, 1981.

(s) James F. Gordon
Senior Judge

HAVE SEEN, NOTICE OF ENTRY WAIVED:

_____

Attorney for Plaintiff

_____

Attorney for Defendant, Donald Powers

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 81-5586

ELIZABETH JANE HALL, - - - *Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, ET AL., - *Defendants-Appellees.*

Appeal From the United States District Court for the Western District of Kentucky.

OPINION—Decided and Filed March 25, 1983

Before: LIVELY and ENGEL, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge. This action was filed against the United States, two officials of the Internal Revenue Service and a Kentucky State police officer seeking injunctive relief, $20,000 in actual damages and one million dollars in punitive damages. The original complaint asserted jurisdiction under 42 U.S.C. § 1983. The amended complaint also relied upon 42 U.S.C. §§ 1985 and 1986 and various provisions of the Constitution. The district court granted summary judgments in favor of defendants. The plaintiff, Mrs. Elizabeth Jane Hall, appeals.

This litigation is a sequel to *Hall* v. *United States*, 493 F. 2d 1211 (6th Cir. 1974), *aff'd sub nom. Laing* v. *United States*, 423 U. S. 161 (1976), in which the issuance of an injunction against the sale of plaintiff's automobile and

other personal property levied upon by the IRS was upheld. The case now is before us on the related issue of the potential personal liability of the defendants. For the reasons set forth below, we affirm the orders of the district court dismissing the action as to all the defendants, except as to the injunctive relief heretofore granted.

I

Subsequent to the arrest of appellant's husband in Texas on drug-related charges, Kentucky state troopers, pursuant to a valid warrant, searched the home of appellant on January 31, 1973. The search uncovered controlled substances. The following day the Acting District Director for the IRS, defendant Thomas P. McHugh, notified appellant by letter that he found her involved in illicit drug activities, thereby rendering ineffectual the collection of income tax for the period January 1, 1973, through January 30, 1973. Pursuant to 26 U.S.C. § 6851, District Director McHugh declared appellant's taxable period for the first 30 days of 1973 "immediately terminated" and her income for that period "immediately due and payable." McHugh assessed the tax in the amount of $52,680.25.

When appellant contended that she was unable to pay the assessed amount, the IRS levied on all her property, including her automobile and bank account. In response, Mrs. Hall brought suit in district court seeking injunctive and monetary relief. Because the IRS never provided Mrs. Hall with a deficiency notice as required by 26 U.S.C. § 6861, this court affirmed the grant of injunctive relief by the district court to restrain the United States from selling the automobile. *Hall, supra,* 493 F. 2d at 1212. The decision of this court subsequently was affirmed by the Supreme Court. *Laing, supra,* 423 U. S. at 185.

That part of appellant's action seeking damages was held in abeyance, pending resolution of the injunction issue,

On the present appeal, appellant asserts that the actions of the defendants in regard to the federal income tax assessment and levy violated her constitutional rights as secured by the fifth, ninth and fourteenth amendments to the Constitution.

On successive motions for summary judgment on the pleadings, the district court dismissed the claims as to each defendant. District Judge James F. Gordon found that District Director McHugh was protected by official immunity since he approved the recommendation of termination and jeopardy assessment while acting within the scope of his official duties. The district court found no evidence connecting McHugh with any conspiracy to deprive Mrs. Hall of her constitutional rights. The district court granted summary judgment for IRS official Elmer Snider since appellant was unable to produce anything outside her pleadings to show that Snider acted improperly or in conspiracy with State officials. The claim against the United States was dismissed on grounds of sovereign immunity. The claim against state police officer Donald Powers was dismissed on the ground, among others, that the plaintiff was unable to point to any wrongdoing committed by officer Powers.

II

Appellant avers that the district court erred in concluding that District Director McHugh was entitled to the defense of official immunity.[1] Although we cannot agree with the conclusion of the district court that McHugh's

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[1]Appellant also claims that the district court erred in ruling that it did not have subject matter jurisdiction under 42 U.S.C. §§ 1983, 1985, 1986. It is clear that any action taken by defendant McHugh, as an IRS official, would be under federal law and not state law for purposes of a claim for relief under § 1983. As to a claim under either § 1985 or § 1986 the record shows that there is

(Footnote continued on following page)

actions were protected by the doctrine of official immunity, we hold that the defense of qualified, good faith immunity applies.

The district court held that McHugh was afforded official immunity under the rule announced by the Supreme Court in *Barr* v. *Matteo*, 360 U. S. 564 (1959). In *Barr* the Court held that federal officials enjoy absolute immunity from suit for common law torts based on acts within their discretionary authority. In *Granger* v. *Marek*, 583 F. 2d 781, 784-85 (6th Cir. 1978), this court followed the *Barr* rule and held that, as applied to *common law torts*, the rule survived the decision of the Supreme Court in *Butz* v. *Economou*, 438 U. S. 478 (1978), in which the Court held that federal officials were afforded only a qualified, good faith immunity from suits for *constitutional torts*. We recently reaffirmed our adherence to the *Barr* rule in the context of common law torts committed by federal officials in *Queens* v. *Tennessee Valley Authority*, 689 F. 2d 80, 84 (6th Cir. 1982).

Appellant asserts that District Director McHugh violated her fifth amendment rights due to his approval of the

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(Footnote continued from preceding page)
no evidence to connect McHugh with any conspiracy to deprive Mrs. Hall of her civil rights sufficient enough to trigger jurisdiction under § 1985 or § 1986.

The district court, however, assumed that it had jurisdiction under the doctrine announced in *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U. S. 388 (1971). Although *Bivens* dealt with a fourth amendment violation, its logic appears equally applicable to the constitutional claims raised herein. *See Laing, supra*, 423 U. S. at 209-10 n. 14 (Blackmun, J., dissenting); *Yiamouyiannis* v. *Chemical Abstracts Service*, 521 F. 2d 1392, 1393 (6th Cir. 1975), *cert. denied*, 439 U. S. 983 (1978) (first amendment); *Cox* v. *Stanton*, 529 F. 2d 47 (4th Cir. 1975) (fourteenth amendment); *Dry Creek Lodge, Inc.* v. *United States*, 515 F. 2d 926, 932 (10th Cir. 1975), *cert. denied*, 449 U. S. 1118 (1981), *reh'g denied*, 450 U. S. 960 (1981) (fifth amendment).

faulty termination and jeopardy assessments. Since appellant has alleged constitutional violations, as opposed to common law tort violations, we conclude that the *Barr* rule is not dispositive of the immunity issue.

In *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974) the Court held that only a defense of qualified, good faith immunity was available to high state officials for violations of constitutional rights. Under the doctrine of qualified, good faith immunity, a government official performing acts within the scope of official conduct is insulated from a suit in civil damages if (1) at the time and in light of all the circumstances there existed reasonable grounds for the belief that the action taken was appropriate and (2) the officer acted in good faith. 416 U. S. at 247-48. In *Butz* v. *Economou, supra,* 438 U. S. 478 (1978) the Court resolved any doubt that the standard enunciated in *Scheuer* applied equally to federal officials. In *Butz* it was held that there was only a qualified, good faith immunity for federal officials charged with constitutional violations, absent some special showing of a need for a full exemption of liability. 438 U. S. at 507. In so holding, the Court distinguished its ruling in *Barr, supra,* finding that case dispositive only as to federal officials whose conduct does not exceed constitutional limits. 438 U. S. at 507.

Inherent in the doctrine of qualified, good faith immunity is both an "objective" and "subjective" aspect. *Harlow* v. *Fitzgerald,* ____ U. S. ____, 102 S. Ct. 2727, 2737 (1982). The former element refers to the presumptive knowledge of the official, whereas the latter encompasses the official's subjective intent in performing the challenged conduct. Taken together, the defense of qualified, good faith immunity will not lie if the official "knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with malicious intention to cause a deprivation of constitutional rights or

other injury." *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975), *reh'g denied*, 421 U. S. 961 (1975). *See Harlow, supra*, ____ U. S. ____, 102 S. Ct. at 2737 n. 25 noting that despite its specific context of school discipline, *Wood* stands as a general statement of the qualified immunity standard.

Most recently the Supreme Court refined the limits of qualified, good faith immunity, placing "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Harlow, supra*, ____ U. S. ____, 102 S. Ct. at 2739. Under this approach summary judgment should issue on the grounds of qualified, good faith immunity if the official's conduct did not violate clearly established statutory or constitutional rights at the time the challenged action occurred. Accordingly, if the law at that time was not clearly established then the official cannot be held to have known that his actions violated the rights of others. *Id.*

Although we reject McHugh's contention that he is entitled to absolute immunity,[2] we hold that he is entitled to the defense of qualified, good faith immunity. From the record it is clear that the approval of termination assessments falls within the scope of the District Director's office. Further, the determination of jeopardy pursuant to 26 U.S.C. § 6851 can be deemed to be within the discretion of McHugh's office.[3] *Cf. Clark* v. *Campbell*, 501 F. 2d 108, 125

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[2]We reject McHugh's assertion that he is entitled to absolute immunity on the basis of the reasoning set forth in *Harlow, supra*, ____ U. S. ____, 102 St. Ct. at 2732-33. Other courts, likewise, have held that such officials of the IRS are entitled to only qualified immunity. *See, e.g., G. M. Leasing Corp.* v. *United States*, 560 F. 2d 1011, 1014-15 (10th Cir. 1977), *cert. denied*, 435 U. S. 923 (1978); *Weir* v. *Muller*, 527 F. 2d 872, 874 (5th Cir. 1976); *Mark* v. *Groff*, 521 F. 2d 1376, 1380 (9th Cir. 1975).

[3]Although the cited authorities deal with 26 U.S.C. § 6861, jeopardy assessment, such cases would equally apply to the Director's use of the jeopardy termination provisions of § 6851(a)(1) given the closely parallel treatment accorded to both provisions. *See Laing, supra*, 423 U. S. at 177.

n. 56 (5th Cir. 1974), *cert. denied,* 423 U. S. 1091 (1976); *Homan Mfg. Co.* v. *H. A. Long,* 242 F. 2d 645, 655 (7th Cir. 1957).

Based on the prior history of the present case, we conclude the actions of District Director McHugh did not violate clearly established statutory or constitutional rights of which a reasonable person would have known at the time the action occurred. As noted by the Supreme Court in disposing of the injunction issue, it was uncertain whether the IRS, when assessing and collecting the unreported tax due after the termination of a taxpayer's period, must follow the procedures mandated by 26 U.S.C. § 6861 for the assessment and collection of a deficiency whose collection is in jeopardy. *See Laing, supra,* 426 U. S. at 166-67. Accordingly, since McHugh could not reasonably have been expected to be aware of the proper procedure not yet been declared, it cannot be concluded that his conduct violated clearly established statutory or constitutional rights. *See Harlow, supra,* ____ U. S. ____, 102 S. Ct. at 2739 ("If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.") *See also Procunier* v. *Navarette,* 434 U. S. 555, 565 (1978); *Wood, supra,* 420 U. S. at 321.

Since defendant McHugh established sufficiently his entitlement to the defense of qualified, good faith immunity, and appellant relied merely on her pleadings to defeat the defense, *see Bryant* v. *Commonwealth of Kentucky,* 490 F. 2d 1273, 1275 (6th Cir. 1974), it was proper for the district court to enter summary judgment for the defendant. *See Harlow, supra,* ____ U. S. ____, 102 S. Ct. at 2739; *Butz, supra,* 438 at 508, *Granger, supra,* 583 F. 2d at 785-86.

III

As to defendant Elmer Snider, a group manager for the IRS, the district court never reached the issue of immunity, finding such inquiry unnecessary in light of appellant's failure to state a claim for relief. We agree.

The record shows that an IRS official, not named in this action, was responsible for the preparation of the tax termination assessment. Defendant Snider was only one of many who "signed off" on the paperwork as it proceeded toward final approval by District Director McHugh. It is also apparent from the record that McHugh did not approve the assessment on the basis of any recommendation given by Mr. Snider. The only link between Snider and the appellant relates to a brief appearance made by Snider with lawyers for appellant shortly after the assessment was levied.

With respect to this appearance the record demonstrates that attorneys for appellant wanted to discuss the matter with Mr. McHugh, since he was the one who signed the assessment. However, Mr. McHugh was unavailable, and Mr. Snider merely appeared in McHugh's place. Beyond this encounter, appellant has not pointed to any evidence that Snider personally deprived her of any statutory or constitutional rights. Further, appellant is unable, except for bare conclusive allegations, to connect Snider with any conspiracy with State officials to constitute action under color of state law. It is clear that Mr. Snider's only connection to the present action is his mere approval of a routine field audit.

Accordingly, failure of appellant to come forward to show genuine issues of material fact warrants summary judgment for defendant Snider. *See Bryant, supra,* 490 F. 2d at 1275.

IV

Appellant also contends that the district court erred in dismissing the claim against the United States on the

grounds that it is protected by the doctrine of sovereign immunity. Appellant argues that the United States has waived its immunity from suit under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., or, alternatively, that the doctrine of sovereign immunity should be abolished. We find these contentions to be without merit.

The United States is immune from suit under the doctrine of sovereign immunity except as it consents to be sued. *United States* v. *Mitchell,* 445 U. S. 535, 538, *reh'g denied,* 446 U. S. 992 (1980); *United States* v. *Testan,* 424 U. S. 392, 399 (1976). Further, "[a]waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Mitchell, supra,* 445 U. S. at 538 *quoting United States* v. *King,* 395 U. S. 1, 4 (1969). In an action for money damages it is clear that the Administrative Procedure Act cannot serve as a basis for a waiver of the Government's sovereign immunity. *See Califano* v. *Sanders,* 430 U. S. 99, 104-07 (1977); *Newson* v. *Vanderbilt University,* 653 F. 2d 1100, 1107 (6th Cir. 1981). The Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., which waives to some extent the Government's immunity, is of no avail to appellant's claim of waiver since § 2680(c) of that Act provides an exception to a claim for relief arising from the assessment and collection of taxes. It is clear that the United States has not waived its immunity to suits of this nature. *See Stankevitz* v. *IRS,* 640 F. 2d 205, 206 (9th Cir. 1981); *Mack* v. *Alexander,* 575 F. 2d 488, 489 (5th Cir. 1978).

Appellant cites *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U. S. 682 (1949), as authority to abolish the doctrine of sovereign immunity. However, *Larson* does not stand for such a proposition, but, rather, the Court stated that such a repudiation was left to the will of Congress. 337 U. S. at 704-05. *See Newson, supra,* 653 F. 2d at 1107.

V

Appellant's final claim is that the district court erred in dismissing her claim against Kentucky state police officer Donald Powers. Appellant avers that officer Powers conspired with the other defendants to deprive her of her constitutional rights, alleging that Powers contacted the IRS and gave erroneous information which resulted in the faulty tax assessment. Appellant also claims that Powers, under color of state law, defamed her by telling friends and associates that she was involved in drug trafficking.

In dismissing the claim against officer Powers the district court held that since he was the only remaining defendant he could not be held to conspire with himself. Although it would be in error to dismiss the conspiracy claim against Powers merely because District Director McHugh was accorded qualified immunity, *see Dennis* v. *Sparks*, 449 U. S. 24, 28 (1980), *Macko* v. *Bryon*, 641 F. 2d 447, 449-50 (6th Cir. 1981), the record is void of any proof as to a conspiracy between Powers and the other defendants.

The record shows that officer Powers, pursuant to his legal authority, executed a valid warrant to search the home of appellant. Further, the record demonstrates that Powers did not contact the IRS concerning appellant's alleged involvement in drug trafficking, but another police officer contacted the IRS without the approval or authority from officer Powers. While it is true that Powers, in his individual capacity, could be liable for any wrongful acts committed in his official capacity under 42 U.S.C. § 1983, it is clear from the record that, beyond the bare and unsupported allegations made by the appellant, no claim can be made against this defendant. Although the appellant raises the issue that Powers defamed her by saying to her friends and associates that she had been selling narcotics, we note that the claim of defamation, standing alone, is not subject to redress under § 1983, absent more tangible harm.

See Paul v. *Davis*, 424 U. S. 693, 709 (1976), *reh'g denied*, 425 U. S. 985 (1976).

Accordingly, the judgments of the district court are affirmed. No costs are taxed. The parties will bear their own costs on this appeal.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 81-5586

ELIZABETH JANE HALL, - - *Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, et al., - - - - - - *Defendants-Appellees.*

JUDGMENT—Filed March 25, 1983

Before: LIVELY and ENGEL, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

ON APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

No costs taxed. Each party to bear its own costs on this appeal.

Entered by Order of the Court
John P. Hehman, Clerk
(s) John P. Hehman/cc Clerk
A True Copy.
Attest:
(s) Audrey Crockett
Deputy Clerk

Issued as Mandate: May 10, 1983

APPENDIX D

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(R. S. § 1977).

§ 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State, and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

(R. S. § 1978.)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(R. S. § 1979.)

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duty. If two or more persons in any State or Territory conspire to prevent,

by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly,

any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, and citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.
(R. S. § 1980.)

CONSTITUTION OF THE UNITED STATES

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE XIV

Passed by Congress June 13, 1866. Ratified July 9, 1868.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppress-

ing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

NO. 83-514

RECEIVED
OCT 18 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ELIZABETH JANE HALL,

PETITIONER

v.

UNITED STATES OF AMERICA
THOMAS P. MCHUGH, AND
ELMER B. SNIDER,

RESPONDENTS

MOTION TO DEFER RULING AND TO CONSOLIDATE

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT:

Petitioner Elizabeth Jane Hall, by and through the undersigned counsel, moves this Honorable Court to Defer Ruling upon her PETITION FOR A WRIT OF CERTIAORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT until the PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT has been received in Siebert v. Baptist, et al.

Petitioner further moves this Honorable Court to consolidate

the two Petitions for further ruling.

As grounds for this motion, your Petitioner has been advised by one Carl Michael Siebert that his case, Siebert v. Baptist, et al, which case contains virtually identical factual and constitutional issues to those of Petitioner's, will be before this Honorable Court on a PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, on or before November 9, 1983. (See Exhibit A, wherein the United States Department of Justice, Tax Division, admits the two cases are "identical")

Petitioner represents to this Honorable Court that in the interest of judicial economy the Motion to Consolidate these two cases should be granted, and that this Honorable Court should Defer Ruling on Elizabeth Jane Hall v. United States, et al until after November 9, 1983.

Respectfully Submitted,

EDWIN F. KAGIN
ATTORNEY FOR PETITIONER
P.O. BOX 77
PEWEE VALLEY, KENTUCKY 40056
(502) 241-5554

CERTIFICATE

This is to certify that a true copy of the foregoing Motion To Defer Ruling and to Consolidate has been mailed, postage prepaid, on this 15th day of October, 1983, to:

HON. GLENN L. ARCHER, JR.
HON. MICHAEL J. ROACH
Assistant Attorney General
Tax Division, Department of Justice
Washington, D.C. 20530

HON. RONALD E. MEREDITH
United states Attorney
U.S. Courthouse
600 West Broadway
Louisville, Kentucky 40202

HON. WILLIAM JOHNSON
Johnson & Judy, Attorneys
326 West Main Street
Frankfort, Kentucky 40601

EDWIN F. KAGIN

U.S. Department of Justice

Tax Division

Washington, D.C. 20530

GLA:MLP:TAGick:vj
5-1-1500

May 6, 1983

Norman E. Zoller, Esquire
Clerk, U. S. Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: Carl Michael Seibert v. Dwight T. Baptist, District Director of Internal Revenue Service, et al.
(11th Cir. - No. 82-7163)

Dear Mr. Zoller:

The above-entitled appeal is scheduled for oral argument before the Court on May 24, 1983. Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, we wish to supplement the authorities cited at pages 15-18 (Argument I) of our brief for the appellee with the Sixth Circuit's recent decision in Hall v. United States, 51 A.F.T.R. 2d 83-1011, 1012 n.1, 1014 (Mar. 25, 1983). There, in a factual situation identical to the case here on appeal, that court held that Revised Statutes, Sections 1979-1981 (42 U.S.C. §§1983, 1985, 1986) did not confer jurisdiction over the plaintiff's claim for damages. We also wish to add the Sixth Circuit's decision in Hall, supra, 51 A.F.T.R. 2d at 1013-1014 to the authorities cited at pages 38, 42 (Argument II) of our brief. In this portion of Hall, supra, the Sixth Circuit held that since the proper termination assessment procedure had not yet been declared at the time of the assessment, the federal defendant who terminated the plaintiff's taxable year was entitled to qualified official immunity.

We are enclosing three additional copies of this letter for distribution to the panel assigned to this case. A copy of this letter today will be mailed to counsel for the appellant.

Sincerely yours,

GLENN L. ARCHER, JR.
Assistant Attorney General
Tax Division

By:

MICHAEL L. PAUP
Chief, Appellate Section

Enclosures

EXHIBIT A

83-514

Office-Supreme Court, U.S.
FILED
NOV 8 1983
ALEXANDER L. STEVAS,
CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE, KENTUCKY
CIVIL ACTION NO. 7571-G

ELIZABETH JANE HALL — PLAINTIFF

VS:

MOTION TO REOPEN ON THE BASIS OF NEWLY DISCOVERED EVIDENCE AND FRAUD

UNITED STATES OF AMERICA,
THOMAS P. McHUGH, ELMER SNYDER
AND DONALD POWERS — DEFENDANTS

Comes Elizabeth Jane Hall, Plaintiff herein, by and through the undersigned counsel, and persuant to Federal Rule of Civil Procedure 60(b)(2), respectfully moves this Honorable Court to reopen this case on the basis of newly discovered evidence and on the basis that Defendants have perpetrated a fraud upon this Honorable Court and upon your Plaintiff.

The Court will recall that this litigation has been on the court's docket for 10 years. The case has been argued twice before the Supreme Court of the United States and twice before the United States Court of Appeals for the 6th Circuit, with a third appeal on relate' issues now awaiting oral argument.

The thrust of the arguments by the Internal Revenue Service, and its agents, has been, and is, the Defendants were acting in good faith.

Subsequent to this Court entering its last order dismissing the last Defendants, Plaintiff has learned through actions taken in a highly similiar case in the U.S. District for the North-

western District of Alabama, that there exists proof that the Internal Revenue Service knew that they were not following their own procedures when they filed a jeopardy tax assessment against Mrs. Hall. Seibert v. Baptist

The Justice Department has essentially claimed that tax court and suits for refund are adequate protection against abusive and/or malicious assessments and seizure. This proposition has now been addressed in Rutherford v. United States, 702 F 2d 580 (5th Cir., 1983), and has been soundly rejected.

Because of the incorrect presumption of correctness and good faith with which the Appellate Court has shielded the Defendants, it is necessary to look to the Internal Revenue Manuals governing the procedure in July of 1972 for the termination assessment of Petitioner. The termination of a year and the amount of the tax assessment are interdependent. They cannot be considered separate and independent from each other. In other words, if the amount of the tax assessment is unreasonable, then the termination cannot be approved even if the taxpayer satisfies other conditions (4585.2 of I. R. Manual). The manual procedures referred to herein were unknown to Plaintiff until after the court dismissed all Defendants. Plaintiff believes these manual pages (appended as Appendix A), warrant reopening of the case both on grounds of newly discovered evidence and as fraud on the part of the Defendants for never making these provisions known to Plaintiff or to the trial and appellate courts. These manual excerpts clearly show that they violated their own known procedural guidelines. Plaintiff will further attempt to show the Court that they did so deliberately. The "tax assessment" was unreasonable from the subjective view of the Defendants. I.R.

Manual 4585.2 Procedure for Terminating Tax Period (Appendix A) requires that the tax assessment be equal to the ultimate tax liability for the terminated period and requires the amount and the termination be personally approved by the District Director; (3) of 4585.2 holds prima facie the unreasonableness of an assessment equal to the amount of money or other valuable property held by a person at time of arrest unless supported by other facts. The Defendants knowingly violated their own rules.

In the present case, the Acting Director, Thomas McHugh, (not the director) knowingly terminated Petitioner's tax year on an assessment many times greater than the amount of property or money of Plaintiff. Additionally, the amount of the ultimate tax liability of the Petitioner was thousands of dollars less than claimed by I.R.S. Moreover, under I.R. Manual 4584.8, immediate review was required, together, with a warning that the proper notices should be sent. No notice was sent Mrs. Hall, and no effort was made by any of the Defendants to abate the tax assessment, even though it was obviously excessive.

The immediate review and issuance of the 90 day letter was required under I.R. Manual. The I.R.S. claimed that issuance of the 90 day letter (statutory Notice of Deficiency), was not required pursuant to assessments made under I.R.C. § 7851. Until Laing and Hall v. United States, 423 U.S. 161 (1976), Defendants claimed that the I.R.S. and its agents did not understand they were required to give a Notice of Defnciency. However, that was not the case, because the Justice Department's position was based on an intentional misrepresentation to the United States Supreme Court. The facts which were known to I.R.S. was that

the issuance of the 90 day review letter was required within 60 days from the date of the assessment. Unlike I.R.S. contends, the subjective test would hold them accountable for the knowledge of Internal Revenue Manual 4585.1 Termination of Taxable Period under I.R.C. S 6851 and I.R. Manual 4584.8 Immediate Review and Issuance of 90 Day Letters (see Appendix A).

As stated supra, the termination and amount were unreasonable. Now, through the assistance of I.R.S. agents, using the same facts known to the Defendants, we shall objectively see whether the "tax assessment" and termination were unreasonable.

Audit Field Agent Dudley M. Weathers reviewed I.R.S. documents and I.R. Manuals as they applied to the Petitioner. In Seibert v. Baptist, he determined the assessment to be unreasonable by I.R.S. accounting and I.R. Manual procedures (Appendix B).

In Siebert v. Baptist, I.R.S. Agent James Pertree, an agent of 32 years service, attested, among other things to the procedure under the improper program whose policies were "set by the District Director", D.T. Baptist. Even under the "program standards", Mr. Pertree would not have recommended the termination and the "tax assessment" on the strength of Agent Larry Hyatt's alleged facts. The responsibility to review the reasonableness of the termination was the Director's. In addition to I.R. Manuals, C. Michael Siebert of Siebert v. Baptist, has personally informed Petitioner that he has located agents who will attest to the requirement that the Notice of Deficiency was required within 60 days of termination. However, the I.R. Manual are so clear on that point, they need little amplification (see I.R. Manual 4584.8, Appendix A), (affidavit - Appendix C).

The program (which was applied to Petitioner) was to improperly use termination assessment and seizure powers of I.R.S. to maliciously prosecute and harass persons selected for that treatment because they were believed to belong to a certain class of taxpayers. The program had two main objectives. One was to seize the assets of persons arrested to prevent them from making bond and hiring counsel (hinder the defense of a criminal case, requiring additional expense to defend the tax case). Second was to "dry up assets" of alleged drug sellers. To make the program effective required an unreasonable assessment. The "tax assessment" was set high enough that it could not be satisfied. Setting the tax assessment beyond reasonable limits of the I.R. Manual precluded review by the Federal District Court through the implementation of 26 U.S.C. §7421 (a) Anti-Injunctive Statute. The only alternative is Tax Court. A condition precedent to Tax Court jurisdiction was the 90 day letter. Withholding the Notice of Deficiency (90 day letter) for over two years precluded Tax Court resolution of the tax assessment. Withdrawing the deficiency to prevent review was obviously not an adequate remedy for deprivation of rights and liberty and expenditure of attorney's fees caused by the malicious prosecution of a bad faith assessment. Rutherford v. Kuntz, 702 F.2d 580 (5th Cir., 1983).

The question of whether the use of assessment and seizure power of the Internal Revenue Service for any purpose other than legitimate revenue claims was proper was answered by Special Agent Thomas B. McWhorter. Mr. McWhorter stated in his affidavit at page 2 that the I.R. Manuals were disregarded for program purposes (see Appendix D). The letter at Appendix E shows a

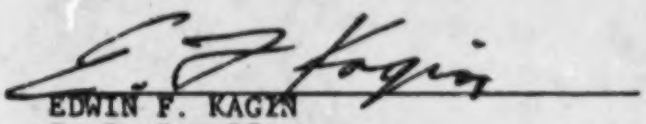
prosecutor dismissing the entire criminal case in the Alabama case that is parallel to Mrs. Hall's.

Plaintiff, Elizabeth Jane Hall, believes and alleges that a conspiracy existed to violate her constitutional rights. At the times this Honorable Court granted summary judgment, the attached I.R.S. Manuals, proving that known procedures were violated, were unknown to the Plaintiff. Further, the I.R.S. agents, whose affidavits are attached hereto and incorporated by reference as fully as if set out verbatim herein were unknown to Plaintiff. Upon information and belief, the individuals who supplied the affidavits will travel to the Western District of Kentucky to testify to the matters contained in their affidavits.

Plaintiff believes that she can show that a fraud was perpetrated on herself, her attorneys, and this Honorable Court by the I.R.S.. Agents of the I.R.S. maintained at all levels of this action that they had acted properly and in good faith. The appended I.R.S. Manual references which are attached hereto and incorporated as reference as fully as if set out verbatim herein show that the agents did in fact know they were acting improperly in Mrs. Hall's case. The affidavits show that there was a national policy of the I.R.S. to ignore and flaunt their own rules. This coupled with the fact that Judge Allen of this District had enjoined identical behavior in the Rambo case only months before, lend great credence to Mrs. Hall's argument that conspiracy and fraud was, and still is, present. For the reasons above stated, Plaintiff, Elizabeth Jane Hall, respectfully moves this Honorable Court to reopen her case so

that she may pursue the newly discovered evidence that has only now come to the attention of she and her counsel.

Respectfully Submitted,



EDWIN F. KAGIN
P. O. Box 77
Pewee Valley, KY 40056
(502) 241-5554
Attorney for Plaintiff

CERTIFICATE

This is to certify that a true copy of the foregoing Motion to Reopen on the Basis of Newly Discovered Evidence and Fraud has been mailed, postage prepaid, on this 17th day of October, 1983, to:

HON. GLENN L. ARCHER, JR.
HON. MICHAEL J. ROACH
Assistant Attorney General
Tax Division, Department of Justice
Washington, D.C. 20530

HON. RONALD E. MEREDITH
United States Attorney
U.S. Courthouse
600 West Broadway
Louisville, KY 40202

HON. WILLIAM JOHNSON
JOHNSON & JUDY, Attorneys
326 West Main Street
Frankfort, Kentucky 40601

HON. JAMES GORDON, Judge
United States District Court
Western District of Kentucky
U.S. Courthouse
600 West Broadway
Louisville, KY 40202

EDWIN F. KAGIN

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Office for review.

4585 Termination Of Taxable Period Under IRC 6851

4585.1 STATUTORY BASIS

(1) IRC 6851 specifically applies when the taxable year of a taxpayer has not ended, and also when the taxable year has ended but the due date for filing the return has not arrived.

(2) Assessments under IRC 6851 are not in a technical sense jeopardy assessments. Nevertheless, the review procedures in IRM 4584.8 relating to jeopardy assessments apply also to assessments under IRC 6851, except with respect to departing aliens (see IRM 4299).

(3) IRC 6658 provides that, in addition to all other penalties, a penalty of 25 per centum of the total amount of the tax or deficiency in tax, may be added as a part of the tax for violations or attempts to violate the provisions of IRC 6851.

4585.2 PROCEDURES FOR TERMINATING TAXABLE PERIOD

(1) Termination of taxable year and assessment must be used sparingly and care taken to avoid excessive and unreasonable assessments. They should be limited to amounts which reasonably can be expected to equal the ultimate tax liability for the terminated period. Therefore, a termination of taxable year and assessment must be personally approved by the District Director or the Director of International Operations. Prior approval must be secured from the Director, Audit Division (CP:A:P), if none of the following conditions exist:

(3) An assessment made as a result of termination of taxable period must be based on a reasonable computation of tax liability. An assessment equal to the amount of money or other valuable property held by a person at the time of arrest is not considered a reasonable computation unless supported by other facts.

(4) A recommendation that the 25% penalty provided by IRC 6658 be added to the tax must be based on the fact that the taxpayer performed, or attempted to perform, an act or acts tending to prejudice or to render wholly or partially ineffectual proceedings to collect income tax made due and payable by virtue of IRC 6851. (See Rev. Rul. 68-96, C.B. 1968-1, 566.)

(5) The basis on which the adjusted gross income was computed will be stated. This will be an acceptable legal basis (for example, a source and application of funds statement or net worth computation). All known assets, liabilities, income and expenses will be considered. A reasonable estimate will be made of expenses, if appropriate, as for

Accounting and Research Division, for jeopardy assessment. After assessment has been accomplished, the service center returns the file with the two copies of Form 2644 to Review Staff for further administrative action. The original Forms 2644 and 2645 are retained by the service center.

(5) Quick assessments may be requested using Form 2859 (Request for Quick or Prompt Assessment). Form 2859 is usually prepared in quadruplicate. Original and one copy are sent to the service center, one copy is retained by preparer, and in bankruptcy cases one copy is sent to Special Procedures Staff in Collection Division. (See IRM 4583.2.)

(6) Telephone requests for jeopardy or quick assessments may be made to the service center when warranted. (See ADP Handbook 342-738.03(6) for service center procedure.) Such telephone requests must be followed promptly with properly approved Forms 2644 or 2859, as appropriate. When a jeopardy or quick assessment is requested by telephone, the following information must be furnished:

(a) Affirmative statement in jeopardy case that District Director has approved Form 2644.

(b) Name, address, and EIN or SSN of taxpayer.

(c) Type of tax.

(d) Taxable period.

(e) Amount of tax, penalty, and interest to be assessed.

(f) Amount of payment, if any, and balance due.

4584.8 IMMEDIATE REVIEW AND ISSUANCE OF 90-DAY LETTERS

(1) Immediately after assessment, all jeopardy assessment cases will be forwarded to the office of the Assistant Regional Commissioner (Audit) for review. Regional review of these cases will be given highest priority and the cases will be returned promptly to the district offices for further administrative action. It should be borne in mind that in such cases any necessary statutory notices not previously issued must be issued within 60 days from the date of assessment.

(2) Jeopardy assessments made by the Office of International Operations will be immediately reviewed by the National Office Audit Division, (CP:A:P).

(3) The purpose of this review are:

(APPENDIX A)

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STATE OF ALABAMA

COUNTY OF MADISON

AFFIDAVIT

Before the undersigned Notary Public personally appeared Dudley M. Weathers who, first being by me duly sworn, did depose and state as follows:

My name is Dudley M. Weathers. I am of legal age and a bona fide resident citizen of Huntsville, Alabama.

I was employed by the Internal Revenue Service from 1972 to 1980 during which time I held the following positions for the periods shown:

from 10-30-72 to 7-5-75	Internal Revenue Agent, National Office, Income Tax Division, Ruling Group
from 7-6-75 to 1-12-80	Internal Revenue Agent, Birmingham District, Audit Division, Huntsville Audit Group

At the request of Carl Michael Seibert, I have examined a number of documents and Internal Revenue Service Manuals which were in effect during the 1972 tax year. These IR Manuals relate to the termination assessments under IR Code § 6851. I have also reviewed the letter which was apparantly sent by Larry R. Hyatt, Group Supervisor, Birmingham Group Intelligence Division, on July 10, 1972 and computation attached thereto. The letter contains no information upon which a reasonable or collectible computation could be based. In essence, the letter states that on July 7, 1972 Mr. Seibert was charged with possession of 1090 L.S.D. blotters, that an informer established that the value of the L.S.D. was $.30 each and that it sold for $1.50 each, and that at the time of his arrest for possession of L.S.D., Mr. Seibert had $2,712.01, a 1969 Oldsmobile 442 and a bank account at Henderson Bank. Mr. Seibert's gross income for the period in question was computed to be $25,930.00 based on the information supplied by the Huntsville Police Department and an informant. Taxes in the amount of $6,458.00 were assessed by the IRS. The letter is absent any direct testimony of personal knowledge

(APPENDIX B)

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of drug sales. Absent some basis other than hearsay evidence, there is not a reasonable basis upon which any of this assessment can, or could be, justified.

In reviewing the figures attached to the letter, I have determined that they are not supported by the evidence in the letter, nor would I, as a Field Agent, have calculated such an assessment. In this assessment, the Internal Revenue Service could not, by standards I am acquainted with, have prevailed in any forum absent the presence of larger unexplained assets or more evidence. Under the information presented by Mr. Hyatt's letter and values of the property as provided by IRS documents, Mr. Seibert's tax for January 1, 1972 through July 7, 1972 would have been more reasonably calculated based on the increase in net worth as follows:

$ 2,712.01	(cash)	1090	LSD blotters
327.00	(blotters)	x .30	cost
50.00	(guitar)	$ 327.00	
550.00	(car)		
97.67	(bank account)		
6.00	(apparently found in auto)		
$ 3,742.68	Net Worth Increase (unless otherwise demonstrated that property was acquired prior to January 1, 1972)		
255.00	Tax on the Net Worth Increase		
19.13	Self-employment tax (7.5%)		
$ 274.13	Total Tax		

Based on the information available to me, the assessment should have been computed using the above figures. It appears the assessment in Mr. Seibert's case was unreasonable.

Dudley M. Weathers

Sworn to and subscribed before me this 1st day of February, 1982.

Notary Public

Best Copy Available

STATE OF ALABAMA

COUNTY OF MONTGOMERY

AFFIDAVIT

I, James Pertree, after being first duly sworn, do depose and say the following:

In the early 1970's the Internal Revenue Service came out with a program to get the money out of drug seller's hands. The main affect of this program was to stop them from buying more drugs, to prevent them from making bond when arrested and from hiring expensive attorneys. Agents and Special Agents of the Internal Revenue Service were selected in Huntsville, Birmingham, Montgomery and Mobile, Alabama to be on a standby basis night and day for a call from a police department that had made an arrest for the sale of drugs. I was called down to the Montgomery City Police Department about 10 times. On each case, an undercover policeman had bought some type of illegal drugs. When I arrived at the police department, the money would be on a table and the drug seller was in the County Jail. I would talk to the undercover policeman who bought the drugs. From that information received pertaining to the drug seller, I made a computation of income tax plus penalty and self-employment tax that would at least equal the cash on the table. As an audit agent, I wrote a report and then either I or a Special Agent would call a Collection Officer and he and I went and talked to the drug seller while he was still in jail. I would talk to him to get any information pertaining to his drug selling and/or his net worth. I would tell the drug salesman he owed "X" number of dollars of tax and would explain to him what I did and ask him if he wanted to pay the tax.

Plaintiff's Exhibit #1

(APPENDIX C)

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They always said "No". The Collection Officer would then serve a lien on the taxpayer and city for all the money on the table and his car. I had 24 hours to get my case to Birmingham to the District Director who had been called before each of my assessments.

The policy of this program was set by the District Director, Dwight T. Baptist, and was communicated within the Internal Revenue Service by every way possible - oral and written, from many people. I do not have any of those memos because when an agent retired, as I did in May of 1980 (after 32 years of service), he is supposed to leave that material with the IRS.

I have reviewed the letter of July 10, 1972 by Larry Hyatt which recommends termination of Carl Michael Seibert's 1972 tax year. I have never seen any termination assessment made when there were no sales charges against the taxpayer or a police officer could not personally attest to sales by that person. I would not have made a termination in Mr. Seibert's case unless the police officer could have provided more than what appeared to be hearsay. I would have asked to talk to someone who personally knew of drug sales.

James Pertree
James Pertree

Sworn to and subscribed before me this 27th day of January, 1982.

Margaret G. Mark
Notary Public

Best Copy Available

The program consisting of the termination of taxable years involving persons arrested for alleged drug violations was mainly to cooperate with local law enforcement agencies and to assist in the drug enforcement program by seizing funds and assets belonging to violators. This was done, as I understood it from my supervisors, to dry up the drug traffic.

As I recall, during this period not too much attention was paid to Manual procedures involving drug law violators, but the main thrust was to tie up funds and assets seized.

Thomas S. McWhorter

Thomas S. McWhorter

Sworn to and subscribed before me on this 13th day of July, 1981.

Virginia A. Flores

Notary Public

Comm. expires 8-3-81

(APPENDIX D)

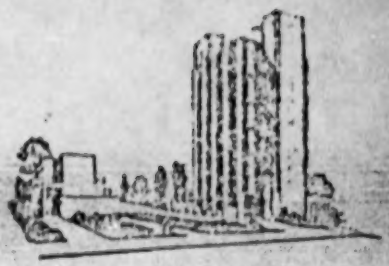
Best Copy Available

CITY OF HUNTSVILLE

GOVERNED BY MAYOR AND CITY COUNCIL

CHARLES H. YOUNGER
City Attorney
E. CANTEY COOPER
Asst. City Attorney
ROY W. MILLER
Asst. City Attorney

P.O. BOX 308
HUNTSVILLE, ALABAMA 35804
★
PHONE: 532-7301



CITY OF HUNTSVILLE MUNICIPAL BUILDING

November 18, 1981

Ms. Norma Jean Robbins
Admissions Secretary
Alabama State Bar
415 Dexter Avenue
P.O. Box 671
Montgomery, Alabama 36101

Dear Ms. Robbins:

During the years of 1972 to 1979 I prosecuted criminal cases for the Madison County District Attorney's Office. Sometime during the scope of my employment there I was assigned a felony case to try against Carl Michael Seibert. After I received the case I interviewed witnesses and worked the case up for possible prosecution. After doing so I made the determination that there was no merit to the prosecution of said case. A request was made by myself to the District Attorney to reassign the case to someone else for them to make an impartial and separate consideration. Without rechecking with the District Attorney's Office to see the outcome, it is my recall that said case was, in fact, dismissed after review by another member of their staff.

After the dismissal and for some three to five years thereafter, I got to know Carl Michael Seibert on a social basis. He highly impressed me as a very intelligent, industrious, and capable individual. It is my opinion that he would make an excellent attorney and should be given all consideration directed toward that end result. Therefore, I respectfully submit that if possible you certify him as a law student in good standing.

Sincerely yours,

Roy Wesley Miller

Roy Wesley Miller

RWM/bab

(APPENDIX E)

Office-Supreme Court, U.S.
FILED
NOV 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-514

In the Supreme Court of the United States

OCTOBER TERM, 1983

ELIZABETH JANE HALL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-514

ELIZABETH JANE HALL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner brought this action for damages and injunctive relief against the United States, two officials of the Internal Revenue Service, and a Kentucky police officer.[1] The court of appeals affirmed an award of summary judgment in

[1]The injunctive aspect of this case was considered by this Court in *Laing* v. *United States*, 423 U.S. 161 (1976), which involved both petitioner and an unrelated taxpayer. After noting that it had "granted certiorari to resolve [a] conflict" among the circuits on the question (423 U.S. at 167, 169), the Court held that a taxpayer is entitled to receive a notice of deficiency when his taxable year is terminated under Section 6851 of the Internal Revenue Code of 1954 (26 U.S.C.) (hereinafter "the Code" or "I.R.C."), and that, because such a notice had not been sent to petitioner, she was entitled to enjoin the government from selling her property (423 U.S. at 168-171, 184-186 n.27). The substantive issues decided in *Laing* are not involved here. Rather, that decision is relevant primarily because it sheds light on the unsettled state of the law at the time of the official actions upon which petitioner's damages claim is based.

favor of respondent McHugh, an I.R.S. official, holding that he was entitled to a defense of qualified immunity; and it affirmed an award of summary judgment in favor of respondent Snider, the other I.R.S. official, holding that petitioner had not stated a claim against him on which relief could be granted. Petitioner seeks review[2] of these holdings.[3]

1. The pertinent facts may be summarized as follows: On January 31, 1973, after petitioner's husband had been arrested on drug-related charges, Kentucky state troopers searched her home pursuant to a valid warrant (Pet. App. 18a). They found controlled substances there (*ibid.*). The next day, respondent McHugh, as Acting District Director of Internal Revenue in Louisville, Kentucky, determined that petitioner's involvement in drug activities "tend[ed] to prejudice or to render * * * ineffectual proceedings to collect [her] income tax for the current * * * taxable year," within the meaning of Section 6851(a)(1) of the Code. In accordance with that Section, McHugh terminated petitioner's 1973 taxable year and declared her income tax for the first 30 days of the year "immediately due and payable." He assessed a tax of $52,680 for that period (Pet. App. 18a). When petitioner failed to pay the tax thus assessed, I.R.S. collection officers levied on her property, including her bank account and a 1970 Volkswagen automobile (*id.* at 1a,

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[2]The court of appeals entered judgment on March 25, 1983, and denied rehearing on April 29, 1983. See 704 F.2d 246 (6th Cir.). Petitioner's motion for an extension of time to file a petition for a writ of certiorari, which was filed on or before July 25, 1983, was thus timely. On July 25, 1983, the Chief Justice extended the time for filing a petition to September 26, 1983. The petition was filed on that date.

[3]The court of appeals also upheld the dismissal of petitioner's claim against the United States, reasoning that the government had not waived sovereign immunity (Pet. App. 12a-13a, 24a-25a); and against the Kentucky police officer, reasoning that petitioner could make out no claim against him on the merits (Pet. App. 15a-16a, 26a-27a). Petitioner does not appear to seek review of these holdings. See Pet. 2.

18a). Shortly thereafter, petitioner brought this action in the United States District Court for the Western District of Kentucky, seeking injunctive relief and damages. As noted above (p. 1 n.1, *supra*), petitioner's claim for injunctive relief was ultimately upheld by this Court in *Laing* v. *United States*, 423 U.S. 161 (1976). The Court there interpreted Section 6861 of the Code to require that the I.R.S. send a deficiency notice to a taxpayer within 60 days of making a termination assessment and before selling the taxpayer's property.

Following this Court's decision, the district court considered petitioner's claims for damages, which had been held in abeyance. It found that respondent McHugh was not "in direct contact with the officer who seized [petitioner's] automobile" and that McHugh's role was limited to "approving, upon recommendation, the termination of [petitioner's] taxable year and in levying the tax assessment" (Pet. App. 2a). Petitioner admitted that she did not know McHugh and had never spoken to him (*id.* at 2a). The court found that respondent Snider, a group manager in the Louisville District Director's Office, was "one of many persons who 'signed off' on the paperwork as it crept toward final approval" by McHugh (*id.* at 9a), and that Snider's only other involvement consisted of appearance at a single meeting, in McHugh's absence, with petitioner's lawyers (*id.* at 10a). Petitioner conceded that she had never seen Snider or spoken with him (*id.* at 9a-10a). Based on these findings, the trial judge, assuming *arguendo* that the doctrine of *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), extended to this case, awarded summary judgment to both respondents. He held that McHugh's acts were "protected under the doctrine of official immunity" outlined in *Barr* v. *Matteo*, 360 U.S. 564 (1959) (Pet. App. 5a), and that petitioner had failed to state a claim against Snider on which relief could be granted (*id.* at 10a-11a).

2. The court of appeals unanimously affirmed. It disagreed with the district court's conclusion that McHugh was entitled to absolute immunity, noting that petitioner had alleged a due process violation, not a common law tort. Pet. App. 20a-21a, citing *Butz* v. *Economou*, 438 U.S. 478, 507 (1978). But it held that McHugh was entitled to qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), reasoning that approval of termination assessments was a discretionary function within the scope of his office (Pet. App. 22a) and that, in failing to send petitioner a deficiency notice, McHugh "did not violate clearly established statutory or constitutional rights of which a reasonable person would have known at the time the action occurred" (*id.* at 23a). The court likewise upheld the dismissal of petitioner's claim against respondent Snider, noting that his "only connection to the present action [was] his mere approval of a routine field audit" and that petitioner had pointed to no evidence, apart from "bare conclusive allegations," that Snider had "personally deprived her of any statutory or constitutional rights" (*id.* at 24a).

3. The court of appeals correctly applied the principles of qualified immunity to the facts of this case. In *Harlow*, this Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. In February 1973, when the actions of which petitioner complains occurred, a taxpayer had no "clearly established right," under either the Code or the Due Process Clause, to receive a notice of deficiency when a termination assessment was made. The only court of appeals that had considered the statutory question had held that the Code

afforded no such right,[4] and the district courts in the other circuits were divided.[5] Indeed, when this Court (by a 5 to 3 vote and after reargument of the case) settled the statutory question in 1976, it noted that it had "granted certiorari to resolve [a] conflict" among the circuits. *Laing*, 423 U.S. at 167, 169. A taxpayer's right under the Due Process Clause to receive a notice of deficiency in these circumstances, furthermore, was even more speculative. No court had decided that question as of February 1973;[6] the only courts that have decided it subsequently have held that no such right exists;[7] and this Court specifically reserved the question in *Laing*.[8] Because neither the statutory nor the constitutional law on the subject was "clearly established" in February 1973, respondent McHugh, in approving the

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[4] *Williamson* v. *United States*, 31 A.F.T.R.2d(P-H) para. 73-456 (7th Cir. 1971).

[5] Compare, *e.g.*, *Irving* v. *Gray*, 344 F. Supp. 567, 571-572 (S.D. N.Y. 1972), aff'd, 479 F.2d 20 (2d Cir. 1973) (holding that a deficiency notice was not required), with *Rambo* v. *United States*, 353 F. Supp. 1021 (W.D. Ky. 1972), aff'd, 492 F.2d 1060 (6th Cir. 1974), cert. denied, 423 U.S. 1091 (1976) (holding that a deficiency notice was required), and *Schreck* v. *United States*, 301 F. Supp. 1265, 1267-1268, 1284 (D. Md. 1969) (same).

[6] But cf. *Schreck*, 301 F. Supp. at 1281 (suggesting, without deciding, that failure to send a deficiency notice in termination situations "raises constitutional questions of equal protection and due process").

[7] *Laing* v. *United States*, 364 F. Supp. 469, 471 (D. Vt. 1973), aff'd, 496 F.2d 853, 854 (2d Cir. 1974), rev'd on other grounds, 423 U.S. 161 (1976). But cf. *Rambo*, 492 F.2d at 1065 (suggesting that failure to send a deficiency notice in termination situations "could very well raise" due process questions).

[8] 423 U.S. at 183-184 n.26. Compare *id.* at 187 (Brennan, J., concurring) (suggesting that Section 6851(a)(1) "falls short * * * of meeting due process requirements") with *id.* at 206 (Blackmun, J., dissenting) (concluding that due process does not require a deficiency notice in termination situations because "the taxpayer has a variety of remedies to test the validity of the Commissioner's action"). See *Phillips* v. *Commissioner*, 283 U.S. 589, 595-596 (1931) (holding that the Constitution does not require a prepayment forum to adjudicate tax disputes).

termination assessment, "could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. The court of appeals thus correctly determined that McHugh was entitled to qualified immunity.[9]

There is no merit to petitioner's contention (Pet. 6) that the decision below conflicts with *Rutherford* v. *United States*, 702 F.2d 580 (5th Cir. 1983). That case involved a *Bivens* claim for damages against an allegedly abusive I.R.S. agent. The Fifth Circuit held that plaintiffs' complaint stated a cause of action for violation of protected "liberty interests" (702 F.2d at 583-584), and remanded for consideration of several "questions [that] remain[ed] unresolved," including the agent's possible "claim of qualified immunity" (*id.* at 584). For the guidance of the trial judge on remand, the Fifth Circuit quoted relevant passages from *Harlow* and urged the district court "to give special attention * * * to deciding whether the [plaintiffs] have shown that [the agent's] actions violated a constitutional right so clearly established that immunity would not attach" (*id.* at 585).

4. Finally, the court of appeals properly held (Pet. App. 24a) that petitioner's failure "to come forward to show genuine issues of material fact warrant[ed] summary judgment for [respondent] Snider." The latter's involvement

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[9]Under *Harlow*, the "subjective element of the good-faith defense" —whether the official " 'took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury' " — is generally immaterial. See 457 U.S. at 815-818 (emphasis added), quoting *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975). Even if McHugh's subjective intent were relevant, petitioner offered no proof of malice on his part; indeed, she admitted (see p. 3, *supra*) that she did not know McHugh and had never spoken with him.

was minimal and there was no evidence that he had personally deprived petitioner of any rights. This factual determination, in any event, does not merit this Court's review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1983

DOJ-1983-11